Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FRANKLIN DELANO LOPEZ,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

Certiorari should be granted to determine:

1. Whether the indictment should be dismissed as a result of the grand jury proceeding with neither the statutorily required foreperson nor the statutorily required deputy foreperson.

2. Whether a stay pending an interlocutory appeal should have been granted by the District Court.

3. Whether the First Circuit Court of Appeals committed error by dismissing the appeal and denying the stay pending interlocutory appeal.

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No. ___

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPINION BELOW

The opinions of the United States District Court for the District of Puerto Rico are unreported and there was no opinion from the First Circuit Court of Appeals. The two (2) opinions of the District Court of Puerto Rico and the Order of Denial of a Stay appear in Appendix "A", "B" and "C" of this Petition. The Order of the First Circuit dismissing the appeal and denying the stay pending appeal appears at Appendix "D".

JURISDICTION

The Court of Appeals Order in this matter was filed on June 2, 1994. This Court's jurisdiction is invoked under Title 28 United States Code §1254 and Rule 13 of the Rules of the Supreme Court effective January 1, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 6 of the Federal Rules of Criminal Procedure is set forth in Appendix "E". The Fifth Amendment of the United States Constitution is set forth in Appendix "F".

Petitioner, Franklin Delano Lopez respectfully prays that a Writ of Certiorari issue to review the Federal Rules of Criminal Procedure Violation under 6(c), the refusal to grant a stay pending interlocutory appeal, and the dismissal of the appeal by the First Circuit Court of Appeals.

STATEMENT OF FACTS

INTRODUCTION

The Defendant was charged in a superseding indictment alleging violations under 18 United States Code § 1014 and 18 United States Code §1343. Prior to the defendant's indictment, and during the grand jury presentation on September 29, 1993 at the beginning of the grand jury session, the prosecution introduced himself and gave a brief introduction to the members of the grand jury. At that time, there was a grand jury foreman as required, however the grand jury's deputy foreperson was absent. The grand jury foreman was recused because he knew the putative defendant and therefore, there was neither a grand jury foreperson nor a grand jury deputy foreperson present. The prosecutor, rather than having an alternative foreperson appointed by the Court and rather than adjourning the proceedings for the day, caused an "acting foreperson" to be appointed so that the proceedings could continue. The acting foreperson presided over the grand jury from September 29, 1993 until December 8, 1993.

The defense learned after the indictment of this FRCrP Rule 6(c) violation and made a motion to dismiss the indictment as a result of abuse of the grand jury process, failure to comply with Rule 6(c) of the Federal Rules of Criminal Procedure, and the fundamental defect in these proceedings.

The District Court without any hearing whatsoever, denied the defendants motion (Appendix A) and the defendant filed an interlocutory appeal (Appendix B). The defendant then made a motion for a stay pending interlocutory appeal to the District Court which was denied (Appendix C) and then to the First Circuit Court of Appeals which denied the motion for a stay and dismissed the appeal (Appendix D).

APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Court of Appeals for the First Circuit, upon motion of the defendant for a stay pending interlocutory appeal denied the motion for a stay and without opinion, dismissed the appeal (Appendix D).

LOWER COURT PROCEEDINGS

Having been denied a stay pending interlocutory appeal, the defendants trial commenced on June 6, 1994 and the defendant was convicted of all counts on July 18, 1994 after a jury trial. Sentencing is scheduled for October 18, 1994.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because:

1. This is a case of First Impression; neither the United States Supreme Court, nor any Circuit Court, nor any District Court has ruled on the issue presented herein.

2. The First Circuit Court of Appeals should have granted the stay pending interlocutory appeal.

3. The First Circuit Court of Appeals should not have dismissed the interlocutory appeal of the defendant.

4. The District Court and the First Circuit Court of Appeals should have recognized that so fundamental a defect under Rule 6(c) of the Federal Rules of Criminal Procedure caused the indictment not to be an indictment, giving rise therefore to the defendants constitutional right not to be tried.

POINT ONE

THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE INDICTMENT.

Rule 6 of the Federal Rules of Criminal Procedure sets forth mandatory requirements with respect to the composition of a grand jury (Appendix E). Rule 6(c) of the FRCrP sets forth the mandatory requirements for appointment of the grand jury's foreperson and the grand jury's deputy foreperson When throughout the proceedings before a grand jury a grand juror is improperly elevated to unsworn "acting foreperson" without Court intervention and in complete contravention of the Federal Rules of Criminal Procedure, very simply, there is no grand jury because Rule 6 of the Federal Rules of Criminal Procedure requires that both in summoning a grand jury, and in appointing a foreperson and deputy foreperson, court action is required. It is mandatory. The Court must appoint one of the jurors to be foreman and another to be deputy foreman. Statutorily, during the absence of the foreman, the deputy foreperson shall act as foreperson.

A substitute or "acting" foreperson cannot be appointed by the prosecution when the foreperson recuses himself and the deputy foreperson is not present. Nowhere in FRCrP 6(c) is the term "acting foreman or foreperson" mentioned. Rather, the statute only refers to a "foreperson" or "deputy foreperson".

In as much as the initiation of prosecution through grand juries forms a vital feature of the federal system of criminal justice, the law governing its procedures and the appropriate considerations for determining the legality of its actions are matters of first importantance. *United States v. Johnson*, 319 US 503, 87 L. Ed. 1546, 63 S. Ct. 1233.

The grand jury serves the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions. *United States v. Sells Engineering, Inc.*, 463 US 418, 77 L. Ed2d 743, 103 S. Ct. 3133 (1983).

The most valuable function of the grand jury [is] not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was directed by ill will. *Hale v. Henkel*, 201 US 43, 50 L. Ed. 652, 26 S. Ct. 370 (1906).

The government attorney's duty is to advise and assist the grand jury; he has no powers of control over it. A prosecutor who presents a case to a grand jury has the obligation of preserving the fairness, impartiality, and lack of bias of the grand jury. *United States v. Gold*, 470 F. Supp 1336 (1979).

Although it has been noted that the grand jury may be guided by the prosecutor the grand jury alone determines the course of any grand jury investigation. *United States v. Dibernado*, 775 F2d 1470, 1477 (CA 11 1985) see also ABA Standards Relating to Criminal Justice, Standard 3-3.5, which discusses a prosecutors relations with the grand jury.

The supervisory power of the Court may be used to dismiss an indictment because of misconduct before a grand jury, at least where that misconduct amounts to a violation of one of those few, clear rules which were carefully drafted and approved by the Supreme Court and Congress to insure the grand jury's functions. *United States v. Williams*, 112 S. Ct. 1735; 118 L. Ed. 2d 352 (1992) citing *Bank of Nova Scotia v. United States*, 487 US 250, 101 L. Ed2d 228 (1988).

Williams (supra) flatly states (at page 364):

> ***Rule 6 of the Federal Rules of Criminal Procedures contains a number of such rules*** (emphasis added)

Rule 6(c) to the Federal Rules of Criminal Procedure states:

> ""Foreman and Deputy Foreman. ***The court shall appoint*** one of the jurors to be foreman and another to be deputy foreman. The foreman shall have the power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. ***During the absence of the foreman, the deputy foreman shall act as foreman.*** *(emphasis added)*

A prosecutors use of a pliable and manipulated grand jury fosters the prosecutorial intention to secure an indictment against a putative defendant, the prosecutor's improper and abusive tactic robbed an independent grand jury, properly impaneled by the judiciary, so as to be able to use the grand jury as a mere tool of the prosecution.

Further, if the deputy foreperson was present when the "acting foreperson" was dubbed, "presiding foreperson", the prosecutor usurped the Congressionally mandated power of the Court and inserted his own selection, thus elevating himself in the eyes of the jury to the stature of someone with more authority than that of the judge. It is the duty of the prosecutor not to obtain the indictment in a manner which threatens the integrity of the judicial process. To do so is prosecutorial misconduct. *see U.S. v. Samango*, 607 F2d 877 (CA9 1979)

Clearly, the ***Deputy Foreperson*** was present and that he was exercising authority over the proceedings yet the prosecutor turned over the proposed indictment to their hand-picked "***acting foreperson***".

The prosecutor's actions destroyed the entire grand jury by assuming the role of judge and appointing an "***acting foreperson***" when a ***deputy foreperson*** (who was properly selected and impaneled by a judge) was present. *See* FRCrP 6(c).

Further, as a matter of law, because the authority of the "***acting foreperson***" sprang from the prosecutors *ex parte* influence it cannot be said with any degree of confidence that the "***acting foreperson***" did not feel some type of allegiance with him. Moreover, that hand picked selection, was able to exercise his influence over the rest of the grand jury. *See Williams*, supra.

The fifth amendment of the United States constitution requires that all "capital or otherwise infamous crimes" be prosecuted by an indictment voted by a grand jury, a requirement that does not apply to the states. *Black v. California*, 369 US 541, 545 (1962) *citing Hirtado v. California* 110 US 516 (1883).

There is simply **no authority** in the law for the appointment, without court intervention, of an unsworn "substitute" or "acting foreperson", nor can counsel find any case law to support this proposition. To the contrary all authorities require judicial, and not prosecutorial intervention.

The prosecution is the legal advisor to the grand jury. [*United States v. Kilpatrick*, 594 F Supp 1324 [main volume] reversed, 821 F2d 1456 affirmed 108 S. Ct. 2369, 487 US 250, 101 L. Ed. 2d 228, on remand 726 F. Supp 789] *see also, United States v. Gold*, 470 F. Supp 1336 (1979). He may not usurp the grand jury's functions. *United States v. Samango*, 607 F2d 877 (CA 1979).

The District Court appointed the grand jury foreperson and deputy foreperson in this case. However, on September 29, 1993, neither was present in the grand jury room. The prosecutor as legal advisor, either caused or allowed an unsworn member of the grand jury to be appointed as unsworn "acting foreperson" without judicial intervention; thus, the requirements of Rule 6 of the Federal Rules of Criminal Procedure were usurped by the prosecution.

Therefore, all testimony given was and is invalid as a matter of law; tainting and destroying the indictment.

The prosecution by so acting and by so advising and by so manipulating robbed an independent grand jury of its ability to act as a grand jury thus rendering the indictment invalid as a matter of law.

The prosecutors arrogance in equating its function with that of the Court's mandatory judicial function is particularly distressing. The prosecutor was on September 29, 1993 required to affirmatively act by either:

a) Seeking advise from the Court on how to proceed

or

b) Adjourning the proceedings for another day.

In proceeding without a proper grand jury foreperson renders the testimony given to be useless as it was given without the mandatory court sworn foreperson or deputy foreperson. Simply stated this was and could not be the statutorily mandated "grand jury".

To ensure the integrity of the grand jury's functions the United States Supreme Court has approved carefully drafted, clear and precise rules passed by Congress. As Supreme Court Justice Frankfurter observed in *McNabb v. United States*, 318 US 332, 347 (1942) "The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedure imposed by law."

In *United States v. Williams*, ___ U.S. ___, 112 S. Ct. 1735; 118 L. Ed. 2d 352 (1992) citing *Bank of Nova Scotia v. United States*, 487 US 250, 101 L. Ed 2d 228, 108 S. Ct. 2369 (1988) the Court held that in the case of misconduct before the grand jury the supervisory power of the Court can be used to dismiss an indictment when the misconduct violates one of those "few, clear rules which were carefully drafted and approved by congress to insure

the integrity of the grand jury's function" *United States v. Mechanik*, 475 US 66, 74, (1986) (O'CONNOR, J., concurring in judgment).

In *United States v. Williams*, *Supra*, the Supreme Court at footnote 6 articulates an example of one such rule:

> "[n6] Rule 6 of the Federal Rules of Criminal Procedure contains a number of such rules . . "

Therefore, the prosecutions violation of Rule 6(c) of the FRCrP and then its presentation of proof to the defective panel renders this indictment so fundamentally defective that as a matter of law it is not an indictment, and the defendant thus has a Constitutional right not to be tried.

In discussing the right to an interlocutory appeal the United States Supreme Court in *Midland Asphalt Corp. v. United States*, 489 US 794, 799 (1989) held that such an appeal is appropriate under circumstances when:

> " . . .a defect so fundamental that it causes the grand jury no longer to be a grand jury or the indictment to no longer to be an indictment, gives rise to the Constitutional right not to be tried."

POINT TWO

THE DISTRICT COURT COMMITTED ERROR AND THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT COMMITTED ERROR BY DENYING A STAY OF THE TRIAL PENDING AN INTERLOCUTORY APPEAL.

28 United States Code Section 1291 provides:

> "The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, The United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court . . ."

However, the Supreme Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541; 69 S. Ct. 1221; 93 L. Ed. 1528 (1949) has recognized a limited exception for certain collateral orders that do not terminate an action. Further, the Supreme Court in *Albany v. United States*, 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed.2d 651 (1977) stated that non-final collateral orders are appealable if they meet three conditions:

A. The district court "had fully disposed of the question . . .; in no sense did it leave the matter open, unfinished, or inconclusive."

B. "[T]he decision was not simply a 'step toward final disposition of the merits of the case' . . ; rather, it resolved an issue completely collateral to the cause of action asserted."

C. "[T]he decision involved an important right which would be 'lost, probably irreparably,' if review had to await final judgment. . ."

The District Court's Order denying dismissal of the indictment for a violation of Rule 6(c) of the Federal Rules of Criminal Procedure fits squarely within the "collateral order doctrine" as set out in *Cohen (supra)* and interpreted in *Abney* (*supra)* as such it is within the appellate Court's jurisdiction to hear an appeal on this issue.

The Fifth Amendment to the United States Constitution states:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."

This amendment is a safeguard designed to protect defendants against oppressive government tactics. *U.S. ex rel. Toth v. Quaries*, App.D.C. 1955, 76 S. Ct. 1, 350 U.S. 11, 100 L.Ed. 8. See, also *U.S. v. Cox*, C.A. Miss. 1965, 342 F.2d 167, certiorari denied 85 S. Ct. 1767, 381 U.S. 935, 14 L. Ed. 2d 700.

In this case the United States Attorney's actions destroyed the grand jury thereby making it impossible for an indictment to be returned.

When the right to be free from trial is not vindicated prior to trial, that right can never be recovered. The Constitutional defect in this case requires that the indictment be dismissed as it was not delivered by a properly constituted grand jury as is required by the Federal Rules of Criminal Procedure.

In reviewing the requirements for an interlocutory appeal set out by the Supreme Court in *Cohen* (*supra)* and applied in *Abney* (*supra)* it is clear that this appeal meets all three prongs of the Collateral Order Doctrine.

First, the Districts Court's Order of May 26, 1994 conclusively disposed of the issue and in no way did it leave the matter "open, unfinished or inconclusive."

Second, the District Court's decision was not simply a "step toward final disposition of the merits of the case [which would] be merged in final judgment", rather it resolved an issue completely collateral to the cause of action asserted.

Third, the decision involved an important right which would be "lost, probably irreparably," if review had to await final judgment".

In addition thereto, the District Court's Order of May 26, 1994 states that "a close reading of the transcript reveals that, with the exception of September 29, when he was not present, the deputy foreperson did take over the duties of the foreperson . . ." Further on, the Court states "the transcript reveals, then, that the only role played by the secretary . . . was to swear in one witness."

Respectfully, the defendant does not agree with the Court's interpretation of the transcript. The Court was required at the very least, to hold a hearing with respect to what took place before the grand jury, however, the Court refused a hearing and merely denied the motion. On September 29, 1993, Miguel A. Pereira, Assistant United States Attorney, presented nine (9) individuals to the grand jury. Each witness was sworn in by the "acting foreperson" (who undoubtedly on that day, was the one appointed by the prosecutor); as such the statement that the only role played by the secretary "was to swear in one witness" is not correct.

Moreover, the Court makes a series of assumptions about who the transcript refers to when the terms "foreperson", "deputy foreperson" and "acting foreperson" are used. It is the defendant's position that absent a hearing on this matter it is impossible to determine who was being referred to at any given time after the 29th day of September when a new "acting foreperson" was impaneled by the prosecutors.

Regardless of whose interpretation is accepted, it cannot be said that the defendant did not suffer prejudice by the prosecutors actions. Looking at the grand jury transcripts as a whole, it is clear what role was assumed by the new "acting foreperson". Moreover, the prosecutors actions in

relation thereto cannot be conclusively determined. The only fact that the Court, the prosecutors and the defendant agree on in relation to this issue, is that there was a violation of Rule 6(c) to the Federal Rules of Criminal Procedure.

Further, in the defendants motion for a stay of trial pending appeal before the First Circuit, the defendant moved pursuant to Rule 8 of the Federal Rules of Appellate Procedure, showed that the underlying appealable issue arose as a result of the prosecutions removal of both a grand jury foreperson and deputy grand jury foreperson (which are required under FRCrP 6(c)) from the grand jury, thus destroying the grand jury and rendering the indictment invalid as a matter of law. Further, the defendant therefore, has a constitutional right not to be tried as defined under *United States v. Williams (supra).*

Finally, in discussing the right to an interlocutory appeal, the United States Supreme Court in *Midland Asphalt Corp. v. United States, (supra)* held that such an appeal is appropriate under circumstances when . . . ". . . a defect so fundamental that it causes the grand jury no longer to be a grand jury or the indictment no longer to be an indictment gives rise to the constitutional right not to be tried."

POINT THREE

THE FIRST CIRCUIT COURT OF APPEALS COMMITTED ERROR BY DISMISSING THE INTERLOCUTORY APPEAL.

The First Circuit Court of Appeals failed to recognize the necessity for both a stay pending appeal and the interlocutory appeal that was pending before it. The Court *sua sponte* dismissed the appeal of the defendant.

Clearly, both a stay pending the interlocutory appeal, and the interlocutory appeal itself, should have been heard by the Court of Appeals for the First Circuit.

Finally, in discussing the right to an interlocutory appeal, the United States Supreme Court in *Midland Asphalt Corp. v. United States*, *(supra)* held that such an appeal is appropriate under circumstances when . . . ". . . a defect so fundamental that it causes the grand jury no longer to be a grand jury or the indictment no longer to be an indictment gives rise to the constitutional right not to be tried."

CONCLUSION

WHEREFORE, it is respectfully requested that this Court issue a Writ of Certiorari to review the judgment and opinion from the District Court of the District of Puerto Rico, and the Order denying the stay and dismissing the appeal in the First Circuit Court of Appeals.

Dated: Buffalo, New York
August 22, 1994

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	Criminal No.
-vs-	)	93-386 (JAF)
	)	
FRANKLIN DELANO LOPEZ	)	
	)	
Defendant	)	

ORDER

Before the court are defendant Franklin Delano Lopez's motions for various reliefs. Defendant raises a multitude of issues in the two motions, which we will address in turn.

I.
Discussion

A. Continuance

Defendant first requests a continuance, alleging that the government has failed to turn over certain discovery materials and others have been delivered in an incomplete state, and, as a result, there is insufficient time for defendant's counsel to adequately prepare for trial. A trial court is granted broad discretion in deciding whether to grand a continuance. United States v. Rodriguez Cortes, 949 F.2d 532 (1st Cir. 1991). Factors which may be taken into account when determining whether to grant a continuance include (1) the amount of time available for preparation, (2) the likelihood of prejudice resulting from a denial, (3) the defendant's role in causing the inadequate preparation time; (4) the degree of complexity of the case, and (5) the availability of discovery from the prosecution. Id. A motion for continuance must be granted if the denial would be an unreasonable and arbitrary insistence on accelerating the proceedings. United States v. Soldevila-Lopez, 17 F.3d 480 (1st Cir. 1994). Such is not the case here. Soldevila-Lopez involved a situation where a

defendant did not have adequate time to respond to a new psychological assessment, which was given on the day of the sentencing. Those circumstances are not similar to the facts here, where defendant has had, and still has, more than sufficient time to prepare for trial.

The trial setting was announced in our January 20, 1994, status conference order. Docket Document No. 13. At that time, and at the request of defense counsel, we granted substantial time for trial preparation. The June 6, 1994 trial setting represents an agreed trial date which allowed defendant almost six months to prepare for trial. The court tied the trial setting with other relief beneficial to defendant. We ordered the early production of Jencks Act material, and forced the government to issue subpoenas against banking institutions, in order to obtain records that the defendant, not the government, needed for trial purposes. Throughout the course of this case, we have considered all dispositive motions filed by the defendant, many of them repetitive in nature. The defendant has obtained prompt rulings from the court. The court has met with counsel and the prosecutor on a number of times to personally verify that the pretrial preparation progressed as expected. Under these circumstances, there will be no continuance.

B. Multiplicity of Counts

Defendant next alleges that three of the counts of the indictment are multiplicious and should, therefore, be dismissed or consolidated. The superseding indictment contains seven counts charging violations of 18 U.S.C. §1014.[1] Counts one, two, and four each allege that false and material statements were made to First Federal Savings Bank

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[1] 18 U.S.C. §1014 provides in pertinent part:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by . . . the Federal Deposit Insurance Corporation . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years or both.

(FFSB) in order to obtain various loans. Defendant contends that each of the FFSB loans constituted a rollover of prior loans, in that each was obtained in order to pay off the previous obligation. Therefore, according to the defendant, each loan with FFSB was inextricably intertwined with the others. The government argues that each of the loans was a separate event, based on individual applications and individual collateral, and caused the bank to disburse separate, discrete amounts of money.

An indictment is multiplicious and in violation of the constitutional prohibition against double jeopardy if it charges a single offense in more than one count. United States v. Brandon, 17 F.3d 409 (1st Cir. 1994). The central question is whether a jury could find that the actions in the allegedly multiplicious counts, viewed objectively, constituted separate events of fraudulent behavior. Id. In Brandon, the First Circuit, addressing the issue of multiplicity in the context of bank fraud, took into account the number of banks, the number of transactions, and the number of movements of money involved in the scheme. The court found separate executions of a scheme to defraud where one bank extended a number of separate mortgage loans based on fraudulent loan applications, each loan was approved separately, and each fraudulent application resulted in a new disbursement of money by the bank.

In essence, defendant's argument is that each succeeding loan was used to extend the amount of time in which Lopez could pay back the previous loan, and not to obtain a new issuance of money. However, the focus of the statute prohibiting the making of a false statement in a loan application is the false statement, not the action induced by that statement, as is evidenced by the fact that actual reliance by the bank is not a required element of the crime. United States v. Copple, 827 F.2d 1182, 1187 (8th Cir. 1987), cert. denied, 484 U.S. 1073 (1988). The statute itself also explicitly mentions that making false statement for the purpose of gaining an extension of a loan is a violation of the statute. In this case, each transaction utilized completely

different documents for collateral.[2] In addition, each of the three loans from FFSB enumerated in the indictment was for a different amount. The first loan, made in November of 1988, was for $300,000; the second loan, made in September of 1989, was for $400,000; and the third loan, made in January 1990, was for $1.4 Million. Even if each loan was used to pay off the previous debt, each time a larger amount of money was borrowed, relying on different false statements, therefore inducing a new disbursement of money over and above the amount which may have been used to pay back the previous loan. In light of these objective facts, we find that the indictment charges three discrete instances where a false statement was allegedly utilized to influence the action of the bank. For this reason, we deny the request for consolidation.

C. Failure to Turn Over Grand Jury Materials

Defendant alleges that the grand jury transcripts turned over to him were incomplete and requests that those witnesses whose testimony transcripts are incomplete be prevented from testifying at trial. The government has notified the court that complete transcripts of the grand jury testimony of Porfirio Brito, Israel Rodriguez, and Rogelio Perez Guzman have been provided to the defendant. Therefore, this request is moot, and the testimony of those witnesses will be allowed at trial.

D. Failure to Turn Over Discovery Materials

This item was dealt with in our order of April 29, 1994. The informative motion of May 17, 1994 confirms that the government has complied with discovery requests.

E. Grand Jury Proceedings

Defendant raises several issues regarding the grand jury proceedings. He argues that the indictment must be dismissed because an FBI agent was sworn in as an agent of

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[2]The loan in count one was secured with several accounts receivable, the loan in count two utilized an insurance claim, and the loan in count four used a lease agreement. The indictment alleges that each of the documents was falsified.

the grand jury, there was an irregularity involving the grand jury foreperson, the prosecution knowingly used false and perjured testimony in front of the grand jury, and the totality of the circumstances destroyed the grand jury's independence.

We begin with the premise that, in order to obtain a dismissal of an indictment for non-constitutional errors in the grand jury proceeding, there must be a finding that the errors were prejudicial to the defendant such that they "substantially influenced the grand jury's decision to indict," or "there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988) (quoting United States v. Mechanik, 475 U.S. 66, 78 (1986). Grand Jury proceedings are given a presumption of regularity such that only "serious and blatant prosecutorial misconduct that distorts the integrity of the judicial process" will result in dismissal of an indictment. United States v. Rivera-Santiago, 872 F.2d 1073, 1088 (1st Circ. 1989) (quoting United States v. Giorgi, 840 F.2d 1022, 1030 (1st Cir. 1988). With this background in mind, we will address defendant's contentions.

1. Role of FBI Agent During Grand Jury Proceedings

The defendant first argues that the independence of the grand jury was compromised because Juan T. Becerra, an FBI agent, became an agent of the grand jury. Defendant alleges that Becerra was present during the grand jury's consideration of unrelated evidence and during discussions between the prosecutor and the jurors.

The Federal Rules of Criminal Procedure do not explicitly authorize the employment of governmental agents by the grand jury. The use of such agents was addressed by the Supreme Court in Nova Scotia. the Court found that where the prosecutors administered oaths to IRS agents to swear them in as agents of the grand jury, and the evidence unquestionably showed that the grand jurors viewed the agents as aligned with the prosecution, but where there was no evidence that this situation caused the grand jury to have an exalted view of the IRS agents' reliability or credibility, or that the presence of the agents had any effect on the grand

jury's decision to indict, there were no grounds to dismiss the indictment. Nova Scotia, 487 U.S. at 259.

The transcript of the grand jury proceedings shows that Luis Plaza, the original Assistant United States Attorney working on the case, introduced Mr. Becerra to the grand jury and asked them to make him their agent. Becerra was sworn in by the foreperson of the grand jury on February 6, 1992. On July 21, 1993, after the investigation had been transferred to a new grand jury, Becerra was sworn in by the foreperson of the new grand jury. When the prosecutor referred to the agent, he called Becerra "an agent of your Grand Jury." See Grand Jury Transcript of October 13, 1993, at 1. There is no evidence to support Lopez' contention that Mr. Becerra was "obviously present during the Grand Jury's consideration of unrelated evidence and during discussions between the prosecutor and the Grand Jury." There is no evidence the grand jury gave any undue reliance or credibility to Becerra's testimony. In sum, we cannot find that the fact that Becerra was sworn in as an agent of the grand jury destroyed the grand jury's independence or tainted the indictment.

2. Grand Jury Foreperson

Defendant alleges that there were some irregularity in the grand jury proceedings involving the foreperson. The selected foreperson knew Mr. Lopez and had to be excused due to this conflict. On September 29, 1993, the day that this first became apparent, the deputy foreperson was not present. As a result, the secretary of the grand jury served as the acting foreperson on that day, and swore in the witness who testified on that occasion. Defendant contends that the secretary, who substituted for the original foreperson, was not appointed by the court as required by Fed. R. Crim. P. 6(c).[3] The defendant further alleges that on later days during

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[3]Fed. r. Crim. P. 6(c) provides:

> The court shall appoint one of the jurors to be foreperson and another to be deputy foreperson. The foreperson shall have power to administer oaths and affirmations and shall sign all indictments. The foreperson or another juror designated by the foreperson shall keep record of the number of jurors concurring in the finding of every indictment and

the investigation, when the chosen deputy foreperson was present, the government continued to defer to the secretary, who had taken over the first day for the original foreperson. Because this secretary was not chosen as specified in Fed. R. Crim. P. 6(c), defendant alleges that the prosecutor may have handpicked this substitute in order to ensure that an indictment would result.

The confusion of the defendant seems to arise from the interchangeable use in the transcript of the terms "deputy foreperson," "Mr. Foreperson," and "acting foreperson." A close reading of the transcript reveals that, with the exception of September 29, when he was not present, the chosen deputy foreperson did take over the duties of the foreperson, as Fed. R. Crim. P. 6(c) dictates. For example, the transcript of testimony from November 10, 1993, reads:

> Mr. Pereira: We have asked, for the record, that the Foreman of the Grand Jury be excused, as he has been excused throughout all the proceedings involving the target of this investigation which I am presently, Mr. Franklin Delano Lopez. Instead, though, we have the acting foreman, the deputy foreman. Sir, do we have a quorum?
>
> Foreperson: Yes. We have 16 jurors.

Grand Jury Transcript of November 10, 1993, at 1.

And on December 8, 1993, when the proceedings began for the day, the following interchange took place:

> Mr. Morales: Mr. Foreperson, I request confirmation-- and excuse me. Before we proceed, Mr. Foreperson, this is the case of Franklin Delano Lopez. As in the past, we would request that you recuse yourself, and I would request that the deputy foreperson assume his duties.

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shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreperson, the deputy foreperson shall act as foreperson.

(The acting Foreperson is excused.)

Mr. Morales: Let the record reflect that Mr. Foreperson has departed the Grand Jury and the Deputy Foreperson has now assumed his duties.

Grand Jury Transcript of December 8, 1993, at 2.

Therefore, later in the proceedings on December 8, 1993, when the proposed original indictment was given to "Mr. Foreperson," our reading of the transcript differs from that of defendant in that we find that the prosecutor was referring to the deputy foreperson, who took over the duties of the original foreperson. This is also borne out by the prosecutor's direction to the jury: "It's necessary, as we have done with all the proceedings throughout this particular proposed indictment, that you deliberate with the Deputy Foreperson and not with the Foreperson of the Grand Jury" (the person who had suffered a conflict of interest). Grand Jury Transcript of December 8, 1993, at 12. The original indictment, signed on December 8, 1993, bears the handwritten title "Deputy Foreperson" under the signature in the space reserved for the foreperson.

The transcript reveals, then, that the only role played by the secretary, who was elevated to acting foreperson for one day, was to swear in one witness. On each of the other days, the deputy foreperson took over, in accordance with Fed. R. Crim. P. 6(c). As to the one day when the deputy foreperson was not present, we cannot find any significant error in that occurrence. The foreman of a federal grand jury has only ministerial duties, which do not meaningfully affect the rights of the accused, and the failure of the foreman to carry out such duties generally will not invalidate an indictment. United States v. Hobby, 702 F.2d 466, 468-69 (4th Cir. 1983), aff'd, 468 U.S. 339 (1984). The use of an acting foreperson to swear in a witness during one day of testimony certainly did not have an influence upon the grand jury's independence, nor is there any evidence that Lopez was

prejudiced by the occurrence.[4]

3. Perjured Testimony

Defendant claims that the prosecutors knowingly used perjured testimony in front of the grand jury. First, defendant alleges that Special Agent Becerra stated to the grand jury that Mr. Lopez caused a for-million-dollar loss to First Federal Savings Bank, a claim which was not supported by any of the evidence, and later told the grand jury that Lopez used falsified collateral to obtain a $2.3 Million loan. Defendant claims that this testimony is controverted by statements of the president of the bank, which suggest that Mr. Lopez' loans are not in arrears, and that the bank "will probably lose over two million dollars."

We fail to find any evidence of perjury. The testimony in front of the grand jury shows that Mr. Lopez, personally and through his several businesses, had a number of loans with FFSB. The statement by the President of FFSB reveals that even the bank is uncertain as to how much money will be lost as a result of the many loans with Lopez. As to the allegation that Becerra's statement about the $2.3 Million loan clearly displayed perjury, such a claim takes the statement out of context. What Becerra said was "[w]e received information through a source that Mr. Delano Lopez had falsified some receivables which were due to him and-he falsified this [sic] receivables to the First Federal Savings Bank in order to obtain a 2.3 million dollar loan." As Becerra was repeating what he had been informed, we do not find a contradiction in

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[4]Defendant's reliance on United States v. Williams, ___ U.S. ___, 112 S. Ct. 1735 (1992), is unavailing. Williams held that the inherent supervisory power of the court may not generally be used to create grand jury procedural rules not specifically required by statute or the Constitution. In so holding, the court reaffirmed that the supervisory power may be used to dismiss an indictment where there are violations of Fed. R. Crim. P. 6 in the grand jury proceedings, which cause prejudice to the defendant. Defendant continues to miss the boat on the point that there will be no dismissal of an indictment for non constitutional violations without a showing of prejudice. Even if the unsworn, handpicked acting deputy foreperson had presided over the entire grand jury proceedings, unless there was some actual prejudice to the defendant, we could not use our supervisory power to dismiss the indictment.

his testimony.

In any event, loss on the part of the bank need not be proven to convict a defendant of making false statements to the bank pursuant to 18 U.S.C., §1014, the statute under which Mr. Lopez was indicted. United States v. Waldrip, 981 F.2d 799, 806 (5th Cir. 1993). Therefore, even if misinformation was given to the grand jury in relation to the actual loss sustained by FFSB, it was immaterial. And once again, we fail to find any suggestion that the grand jury was influenced by such allegedly perjurious testimony in its decision to indict.[5]

The second instance of perjury is allegedly found in the testimony of Arturo Somohano, an officer from FFSB. According to Lopez, Somohano testified before the grand jury that there was only one occasion, in 1990, when Somohano became personally involved with one of Mr. Lopez' loans, and authorized the disbursement of the loan on his own initiative. Lopez contends that this is totally controverted by evidence that Mr. Somohano was involved with, and approved, many of Lopez' loans with FFSB. Viewing Mr. Somohano's testimony as a whole, we find that Lopez mischaracterizes the statements made. Somohano testified that "at no time did I authorize any disbursement to Mr. Lopez that was not an order from my superiors," except for one situation which involved a piece of land that was to be leased to Pueblo Supermarkets. We do not take this statement to suggest that Somohano never authorized any of

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[5]Even if material perjurious testimony was actually presented to the grand jury, it is unclear whether our supervisory power could be used to dismiss the indictments after the Supreme court's holding in United States v. Williams, ___ U.S. ___, 112 S. Ct. 1735 (1992). In Williams, the Court held that the supervisory power may only be used to dismiss an indictment for misconduct before the jury when the misconduct consists of a violation of those "few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions." Williams, 112 S. Ct. at 1741 (quoting United States v. Mechanik, 475 U.S. 66, 74 (O'Connor, J., concurring). See also United States v. Sitton, 968 F. 2d 947, 953 (9th Cir. 1992) (uncertain whether Williams prohibits supervisory dismissal of indictment based on use of perjured testimony before grand jury).

Lopez' loans, merely that he did not agree with is superiors' frequent order to authorize loans to Lopez. Even assuming that there was a discrepancy in Somohano's testimony, we fail to see how Lopez could have been prejudiced by such a statement.

4. Totality of the Circumstances

Defendant alleges that the totality of the circumstances necessitates the dismissal of this indictment. We noted above, the ability of trial courts to dismiss indictments under our supervisory power has been seriously circumscribed by the Supreme Court. See also United States v. Santana, 6 F.3d 1, 11 (1st Cir. 1993) (federal courts should "refrain from using the supervisory power to conform executive power to judicially preferred norms by dismissing charges, absent cognizable prejudice to a particular defendant"). After finding that none of the individual allegations create any concern of prejudice to the Defendant, we cannot find that the combination of several baseless claims should result in the extreme remedy of a dismissal of this indictment.

F. Attorney-Client Relationship

Finally, we address Lopez' contention that documents recently revealed to him show that the prosecution interfered in the attorney-client relationship between Lopez and Lius Plaza, Lopez' original attorney. Lopez claims that correspondence between the acting U.S. Attorney, Guillermo Gil, and the Office of Professional Responsibility, reveals that Gil conversed with Plaza with Plaza represented Lopez. The correspondence which is the object of this contention was generated in response to Lopez' complaints, which have been detailed in previous orders,[6] regarding misconduct on the part of the U.S. Attorney's Office. In the memo of November 16, 1993, Gil states that he contacted Plaza in order to investigate the charges made by Lopez. We fail to see how Lopez can maintain that there was a breach of the attorney-client privilege when he himself loudly published the

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[6]More background regarding Lopez' various allegations surrounding the alleged attempts of several Assistant U.S. Attorneys to secure his support for the post of U.S. Attorney can be found in our orders of April 15, 1994 and March 31, 1994.

allegations which the U.S. Attorney proceeded to investigate. Of course, the attorney-client privilege may be waived by revealing information to a third party. See. United States v. Gann, 732 F. 2d 714, 722-23 (9th Cir)., cert. denied, 469 U.S. 1034 (1984). After Lopez publicly claimed that AUSA Osvaldo Carlo Linares had suggested to Plaza that Lopez' indictment would be dropped if Lopez were to use his influence to secure the post of U.S. Attorney for Carlo, we cannot find that Plaza's denial that such a conversation took place was in violation of the attorney-client privilege. The privilege requires that an attorney retain the confidences disclosed by this clients; it does not require an attorney to agree with whatever the client claims has occurred.[7] It is unclear how Mr. Lopez conceived that his claim of misconduct was to be investigated, other than by discussing the allegations with those who were involved. Mr. Plaza's offer to be available in order to discuss the allegations raised by Lopez does not constitute a breach of the attorney-client privilege.

Lopez' claim that AUSA Carlo "admits that on October 28, 1993 he had a conversation with Luis Plaza contrary to Plaza's obligations as counsel [sic] Mr. Lopez" is simply not borne out by the facts. According to the memo written by Carlo, he was contacted by Plaza regarding the possible endorsement of Carlo by Lopez, for the office of U.S. Attorney, and Carlo stated that he could not meet with Lopez due to the potential conflict of interest, as Lopez was under grand jury investigation. The attorney-client privilege only covers communications with an attorney for the purpose of securing a legal opinion or legal services. United States v. Wilson, 798 F.2d 509, 512 (1st Cir. 1986). Therefore, the discussion of Lopez' possible support for Carlo's nomination to the post of U.S. Attorney could not have been a violation of the attorney-client privilege. Even if we were to find such a violation, there is not the least insinuation that it may have infected the grand jury's decision to indict Mr. Lopez.

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[7]Lopez suggests that these new documents should cause us to revisit his claim of the conflict of interest of Mr. Plaza. Because we had these documents for in camera inspection at the time of our previous rulings on this issue, we see no need to address it yet again.

II.
Conclusion

In the multitude of motions which Mr. Lopez has paraded before this court, we cannot find any evidence of prejudice to the defendant in the sense of influencing the grand jury's decision to indict. For this reason, the indictment must stand. Defendant's motions for dismissal of the indictment, consolidation, and other relief, Docket Nos. 42 and 44, are **DENIED IN ALL ASPECTS.**

IT IS SO ORDERED.

San Juan, Puerto Rico, this 25th day of May, 1994.

JOSE ANTONIO FUSTE
U.S. District Judge

s/c: AUSA
A. Feuerstein
USM
PTSO

5.26/94 ns

APPENDIX B

NOTICE OF APPEAL
UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA
PLAINTIFF,

V.

Criminal No.
93-386 (JAF)

FRANKLIN DELANO LOPEZ
DEFENDANT

JOSE ANTONIO FUSTE
(District Court Judge)

Notice is hereby given that FRANKLIN DELANO LOPEZ, THE DEFENDANT HEREIN, appeals to the United States Court of Appeals for the First Circuit from the ORDER OF THIS COURT SIGNED ON MAY 25, 1994, AND FILED IN THE CLERKS OFFICE FOR THE UNITED STATES DISTRICT COURT DISTRICT OF PUERTO RICO ON THE 26 DAY OF MAY 1994 (ATTACHED HERETO IS A FULL COPY OF SAID ORDER) AND FROM EACH AND EVERY PORTION OF SAID ORDER AND DECREE.

Notice is further given that, the appellant herein, does hereby, move this Court for a stay in the lower court of all proceedings under the authority of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541; 69 S. Ct. 1221; 93 L. Ed. 1528 (1949); Abney v. United States, 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed.2d 651 (1977) Midland Asphalt Corp v. United States, 489 US 794 (1989).

THE ALLEGED OFFENSE HEREIN OCCURRED PRIOR TO AND AFTER SEPTEMBER 1st., 1987.

Alan R. Feuerstein
Counsel for Appellant
P.O. Box 193600
San Juan, Puerto Rico 00919-3600
(809) 759-7600
Fax (809) 758-7162

Date: May 27, 1994

To: Epifanio Morales, Esq.
Miguel Pereira, Esq.
United States Attorneys Office
District of Puerto Rico
Federal Building 1759 Room 452
Carlos Chardon Ave. #150
Hato Rey, PR 00918-1767

The Clerks Office
U.S. Court of Appeals
1st. Circuit Court of Appeals
1606 John W. McCormack
Post Office & Courthouse
Boston, Mass. 02109

The Clerks Office
U.S. District Court
District Court of Puerto Rico
Federal Building 1759
Carlos Chardon Ave. #150
Hato Rey, PR 00918-1767

NOTICE: No transcript order for the appeal herein has been placed because there had been no transcripts of the proceedings relating to the order appealed from.

Certification by attorney _____ Date signed May 31, 1994

Alan R. Feuerstein
Counsel for Appellant
P.O. Box 193600
San Juan, Puerto Rico 00919-3600
(809) 759-7600
Fax (809) 758-7162

CERTIFICATION OF SERVICE

I hereby certify that on the 31 day of May 1994, a copy of the foregoing motion was delivered to Epifanio Morales, Room 452 Federal Building, Hato Rey, Puerto Rico 00918 Tel. (809) 766-5656

_____

Dated: May 31, 1994

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	Criminal No.
-vs-	)	93-386 (JAF)
	)	
FRANKLIN DELANO LOPEZ	)	
	)	
Defendant	)	

ORDER

This court has reviewed the defendant's motion for a stay of trial pending appeal. The trial is set for June 6, 1994. The notice of interlocutory appeal was filed with the Clerk of the Court on May 31, 1994. The interlocutory appeal has been filed seeking review of this court's Opinion and Order entered May 26, 1994, Docket Document No. 44. The defendant-appellant seeks interlocutory review of our denial of his motion to continue the trial, to dismiss or consolidate counts of the indictment, and to dismiss the indictment for claimed irregularities during the grand jury proceedings.[1]

This court has carefully considered and addressed each of Lopez' three previous motions for various pre-trial remedies. See attached Opinions and Orders, Exhibits 1, 2, and 3. We have met with counsel on a number of occasions and set a trial date convenient to the defendant, in order to allow more than sufficient time to prepare for trial. In yet another attempt

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1 The alleged irregularities relate to the role of an FBI agent as an agent of the grand jury, the improper substitution of a grand jury member as foreperson, the use of perjured grand jury testimony, conflict of interest on the part of an Assistant U.S. Attorney, and a variety of discovery disputes.

to hold off trial, defendant now seeks interlocutory review.[2]

Appellate courts only have jurisdiction to review "final judgments and decrees" of federal district courts. Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989). In criminal trials, this allows no appellate review until after conviction and sentencing, unless an order fits into a narrow exception known as the collateral order doctrine. Id. In order to be classified as collateral in a criminal case, an order must (1) conclusively determine the disputed question; (2) resolve an important issue wholly separate from the merits; and (3) be effectively unreviewable by a direct appeal following conviction. Id. Only three types of prejudgment motions in criminal trials have been found appealable by the Supreme Court: Motions to reduce bail, Stack v. Boyle, 342 U.S. 1 (1951); motions to dismiss on double jeopardy grounds, Abney v. United States, 431 U.S. 651 (1977), and motions to dismiss under the Speech of Debate Clause, Helstoski v. Meanor, 442 U.S. 500 (1979). The Supreme Court has rejected attempts to obtain interlocutory review of motions to dismiss indictments for violations of Fed. R. Crim. P. 6(c) (grand jury secrecy), Midland, 489 U.S. 794, and alleged prosecutorial vindictiveness, United States vs. Hollywood Motor Car Co., Inc., 458 U.S. 263 (1982), among others. The circuit courts have routinely denied collateral appeals from pretrial motions, except for the three exceptions recognized by the Supreme Court. See United States v. Fisher, 871 F.2d 444 (3d Cir. 1989) (no collateral appeal from claim of perjury before the grand jury and prosecutorial misconduct); United States v. Storey, 2 F.3d 1037 (10th Cir. 1993) (no appeal from motion to dismiss indictment for violation of grand jury secrecy and prosecutorial misconduct); United States v. Cannon, 715 F.2d 1228 (7th Cir. 1983) (no collateral appeal from claim of prosecutorial misconduct); In re April 1977 Grand Jury Subpoenas, 584 F.2d 1366 (6th Cir. 1978) (no appeal from pretrial order regarding conflict of interest of attorney); but

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[2] The June 6, 1994 trial setting was announced in our January 20, 1994 status conference order, Docket Document No. 13. At the request of defense counsel, we granted several months to be devoted to trial preparation. The June 6, 1994 trial date was agreed to by both the government and defense counsel. See Order of May 26, 1994, at page 2.

see United States v. Booth, 673 F.2d 27 (1st Cir. 1982) (pretrial order denying motion to dismiss on double jeopardy grounds is collaterally appealable under Abney).

Based upon this precedent, our order of May 26, 1994, denying Lopez' request for various remedies is not collaterally appealable. Each of the allegations brought by Lopez is capable of being reviewed upon direct appeal following a trial if necessary. See Midland, 489 U.S. at 801 (only appeals of orders pursuant to legal rules which textually guarantee a right not to stand trial, such as Double Jeopardy Clause, must be challenged collaterally prior to trial or are effectively lost). Therefore, the motion requesting a stay is **DENIED.**

IT IS SO ORDERED.

San Juan, Puerto Rico, this 1st day of June 1994.

JOSE ANTONIO FUSTE
U. S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	Criminal No.
-vs-	)	93-386 (JAF)
	)	
FRANKLIN DELANO LOPEZ	)	
	)	
Defendant	)	

ORDER

The motion for a stay pending appeal is **DENIED.**

The appeal is **dismissed.**

IT IS SO ORDERED

2nd day of June, 1994.

APPENDIX E

III. INDICTMENT AND INFORMATION

Rule 6. The Grand Jury

(a) Summoning Grand Juries. The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(b) Objections to Grand Jury and to Grand Jurors.

(1) Challenges. The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn, or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) Motion to Dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U.S.C. § 1867(e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(c) Foreman and Deputy Foreman. The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every

indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

(d) Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording devise may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosure of Proceedings.

(1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to--

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made--

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or

subdivision of a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(c)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

(4) Sealed Indictments. The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

(5) Closed Hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury

proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) Sealed Records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

(f) Finding and Return of Indictment. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a federal magistrate in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in finding an indictment, the foreman shall so report to a federal magistrate in writing forthwith.

(g) Discharge and Excuse. A grand jury shall serve until discharged by the court, but no grant jury may serve more than 18 months unless the court extends the service of the grand jury for a period of six months or less upon a determination that such extension is in the public interest. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

(As amended Feb. 28, 1996, eff. July 1, 1996; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 26, 1976, eff. Aug. 1, 1976; July 30, 1977, Pub.L. 95-78, § 2(a), 91 Stat. 319; Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985.)

Amendment of Rule

Pub. L. 98-473, Title II, §§ 215(f), 235(a)(1), Oct. 12, 1984, 98 Stat. 2016, 2031, as amended by Pub.L. 99-217, § 4, Dec. 26, 1985, 99 Stat. 1728, provided that, effective Nov. 1, 1987, subd. (e)(3)(C) of this rule is amended by adding the following subdivision, which provisions were similarly added by order of the Supreme Court dated Apr. 29, 1985, eff. Aug. 1, 1985:

"(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law."

APPENDIX F

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.